U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 08 2007

SRC 05 197 51847

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an oral and maxillofacial surgeon. At the time he filed the petition, the petitioner was serving a residency at Emory University School of Medicine. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The record establishes the petitioner's professional credentials as an oral and maxillofacial surgeon. The intrinsic merit of the petitioner's occupation is not in dispute. The next prong of the national interest test, as set forth in *Matter of New York State Dept. of Transportation*, is national scope. To make a determination on this issue, we must examine the nature of the petitioner's intended work.

Professor [redacted] Chief of the Division of Oral and Maxillofacial Surgery at Emory University, states:

> [The petitioner] is currently an Oral and Maxillofacial Surgery Resident Division of Oral and Maxillofacial Surgery at Emory University School of Medicine. He is at a critical aspect of his training which he will complete in June of 2007. . . . There currently exists a critical shortage of trained maxillofacial trauma surgeons in the United States. . . . [F]inding well trained people to provide these services, especially in rural areas has become impossible. Upon completion of the Emory Oral and Maxillofacial Surgery Residency training program, [the petitioner] will have received extensive training in maxillofacial trauma and is expected to provide these services to the public.
>
> Additionally, [the petitioner] is engaged in important research in the area of bone growth and regeneration. The viability of these projects requires his continuing leadership and attention. The results of these studies will make important contributions to the area of science that is the basis for the clinical services for reconstruction of maxillofacial defects either congenital or acquired.

> To interrupt his training or his research, in my opinion, would do significant harm to both areas.

It is not self-evident that the petitioner's need to complete short-term professional training is a valid basis for a permanent immigration benefit. The issue is moot here, because according to CIS records, the petitioner holds an H-1B nonimmigrant visa, authorizing him to work at Emory University until June 30, 2007. Therefore, the petitioner is already able to complete his training "in June of 2007" as Prof. [redacted], even without a national interest waiver, permanent resident status, or any further immigration benefit beyond the nonimmigrant visa that he already has.

We shall discuss, in the context of the appeal, the assertion that there is a shortage of qualified oral and maxillofacial surgeons.

The petitioner's initial submission contains little specific information regarding what is said to be the petitioner's "important research in the area of bone growth and regeneration." There is no indication that this research will continue after the petitioner completes his residency. This is an important concern because, while medical research can be national in scope owing to the dissemination of findings, clinical patient treatment is inherently local, directly affecting only those particular patients whom the beneficiary treats. *Cf. Matter of New York State Dept. of Transportation* at 217, n.3.

The petitioner submits a printout from [redacted] describing the residency program headed by Prof. [redacted] The printout refers to "a detailed description of the OMFS residency" available at [redacted] This brochure indicates that the residency program includes an elective research rotation, suggesting that the petitioner's research activities are a part of his short-term academic training, rather than an independent activity that the petitioner has the intention or means of continuing.

While the petitioner has produced some published work in connection with his residency at Emory, the record is devoid of evidence that this pattern will continue after the petitioner completes his residency. Therefore, the petitioner's initial submission does not establish national scope.

On August 10, 2005, the director issued a request for evidence (RFE), instructing the petitioner to submit further documentation to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director specifically requested "further evidence to establish how the benefit the beneficiary is to impart to the United States will genuinely be on a national scale." The director also inquired regarding the third prong of the national interest test, asking for evidence to distinguish the petitioner from other trained oral and maxillofacial surgeons.

In response, the petitioner submits various letters and documents, and a statement from counsel. Counsel repeats this same statement, almost verbatim, on appeal, and we shall address counsel's assertions in that context.

Dr. [redacted] an oral and maxillofacial surgeon practicing in Bangalore, India, employed the petitioner for several years. Dr. [redacted] states that the petitioner's "research in the field of BMP-antagonists is very promising to prevent ankylosis especially in children with condylar trauma." Dr. [redacted] asserts that the petitioner has also studied "the relation of HIV disease and Mandibular trauma." The record contains no published work by the petitioner on these subjects.

Dr. Executive Director of the American Association of Oral and Maxillofacial Surgeons (AAOMS), states:

> I am pleased to attest to the significant role that [the petitioner] plays in our specialty as Vice Chairman of the Resident Organization of the AAOMS (ROAAOMS) and as a mentor to his fellow residents. Upon completion of training, [the petitioner] hopes to pursue a career in full time academics and aspires to be a bridge between oral maxillofacial surgeons in the United States and India.

The new assertion that the petitioner "hopes to pursue a career in full time academics" is not consistent with the initial submission, which portrayed the petitioner first and foremost as a surgeon providing clinical patient care. This new claim also appears to be in tension with counsel's claim that there is a "dire need" for oral and maxillofacial surgeons, given that the pursuit of "full time academics" would greatly reduce the amount of time the petitioner would be able to devote to actual surgery. Therefore, the various claims in response to the RFE seem to lack consistency.

Regarding the petitioner's position as Vice Chairman of the ROAAOMS, there is no evidence that the petitioner held this position when he filed the petition on July 7, 2005. The letter welcoming him "as an elected member" is dated October 12, 2005, three months after the director issued the RFE. (The letter is addressed to the petitioner and generally refers to him in the second person, but some passages mention the petitioner by name and discuss him in the third person.) There is earlier evidence that the petitioner has been active in various professional organizations both in the United States and in India, but this evidence does not indicate that the petitioner, as an individual, has had a significant impact on the practice of oral or maxillofacial surgery. Indeed, a number of witness letters state that it is in the national interest to allow the petitioner to "complete his training," a phrase that necessarily implies the corollary that, as of late 2005, these individuals did not yet consider the petitioner to be a fully trained and qualified surgeon.

The director denied the petition on November 28, 2005. The director discussed the evidence submitted with the petition and, later, in response to the RFE. The director observed that, because the beneficiary holds a valid nonimmigrant visa, the labor certification process would not interrupt the completion of the petitioner's training. The director also found that the petitioner "has not sufficiently established that he possesses qualities and attributes that cannot be articulated on an application for labor certification."

As noted previously, most of counsel's appellate statement is taken verbatim from the statement that accompanied the RFE response. Repetition of prior claims adds nothing of substance to the record. We will limit consideration, here, to specific points that the director failed to discuss in the denial notice.

Counsel, having repeated yet again that claim that "there is a national shortage of experienced surgeons," states: "The RFE reply contained documentation verifying this shortage, and the critical need for trained oral and maxillofacial surgeons." A shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. *See Matter of New York State Dept. of Transportation* at 215, 218. If the demand for maxillofacial surgeons outstrips the supply, then this would be a favorable factor in obtaining a labor certification, because approval of a labor certification is contingent on the demonstration that no qualified United States worker is available for a given position. Although counsel cites *Matter of New York State Dept. of Transportation* on appeal, counsel says nothing about the holding in that decision that a worker shortage is not grounds for a waiver, either to distinguish the present matter from that holding, or even to acknowledge the general principle. Counsel merely argues that, because there is a shortage of oral and maxillofacial surgeons, an employer should not have to prove to the Department of Labor that there is a shortage of oral and maxillofacial surgeons.

We note that section 203(b)(2)(B)(ii) of the Act, and its implementing regulations at 8 C.F.R. § 204.12, create special national interest waiver rules relating to physicians in medically underserved areas, effectively exempting such physicians from the compass of *Matter of New York State Dept. of Transportation*. Those statutory and regulatory provisions, however, contain numerous specific evidentiary requirements that the petitioner has made no apparent effort to meet. For instance, the petitioner would need to specify a specific geographic location where he intended to practice, and demonstrate that the Department of Health and Human Services has designated that location as a medically underserved area. The general assertion that a shortage exists in the petitioner's specialty is not sufficient to trigger the provisions of the aforementioned statute and regulations. Furthermore, while the petitioner identifies himself as a "physician," his degrees in Dental Science appear to place him outside the scope of 8 C.F.R. § 204.12(a), which specifies that only "doctors of medicine and doctors of osteopathy" qualify as "physicians" for the purposes of this special class of waiver. Therefore, we find that the above-cited provisions are not applicable to the present proceeding. The director adjudicated the petition under *Matter of New York State Dept. of Transportation*, and on appeal, rather than argue that the precedent decision does not apply in this instance, counsel contends that the petitioner qualifies under that precedent.

Counsel states that the petitioner "employed unique and innovative techniques in hospitals throughout India. Because the pathology in India is very different from that seen in the US, [the petitioner] has had exposure to techniques that US surgeons have not experienced." Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221. Furthermore, if, as counsel claims, the petitioner's techniques differ from those used in the United States "[b]ecause the pathology in India is very different from that seen in the US," it is reasonable to ask how much need there is for those techniques in the United States. The record is devoid of evidence to show that the petitioner is the first to bring these techniques from India, or that by doing so he has significantly affected the practice of oral or maxillofacial surgery in the United States. The record is, on the other hand, replete with evidence to show that United States surgeons consider the petitioner's training to be

incomplete (albeit advanced), and that he will be fully qualified to practice one he has learned more from them (rather than vice versa).

While counsel and the petitioner's witnesses have listed some of the petitioner's specific accomplishments, such a list does not inherently establish that his work is better or more important than that of other surgeons. There is no objective demonstration that the petitioner stands apart from his peers in such a way that his continued presence in the United States outweighs the national interest inherent in protecting workers via the labor certification process. Assertions by mentors and colleagues that the petitioner is highly skilled, and will be an excellent surgeon once he becomes fully qualified at some future point, cannot suffice in this regard.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.